

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

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United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
against

Plaintiff-Appellee,

FRANCISCO ADRIANO ARMEDO-SARMIENTO, aka Eduardo Sanchez, aka Pacho el Mono, aka Elkin, aka Francisco Velez, EDGAR RESTREPO-BOTERO, aka Omar Hernandez, aka el Sobrino, aka Edgar, LEON VELEZ, JORGE GONZALEZ, aka Jorge Arboleda, LIBARDO GILL, aka Ramiro Estrada, RUBEN DARIO ROLDAN, CARMEN GILL, aka Carmen Estrada-Restrepo, aka Carmen Mazo, WILLIAM RODRIGUEZ-PARRA, aka Jairo, OLEGARIO MONTES-GOMEZ,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

REPLY BRIEF OF APPELLANT
EDGAR RESTREPO-BOTERO

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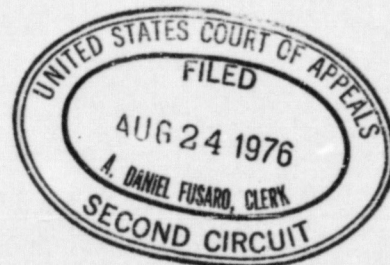


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APPELLANT BOTERO'S REPLY TO GOVERNMENT'S
POINT V THAT THE DOUBLE JEOPARDY DOES NOT
BAR HIS CONVICTION FOR CONSPIRACY

The Government's answering memorandum to appellant BOTERO'S assertion that the Double Jeopardy clause of the Fifth Amendment prohibits piecemeal prosecution exhibits inexperience and a lack of understanding of the constitutional issues.

First, the government has totally misconstrued the argument raised by the appellant. The Government fails to address the issue of piecemeal prosecutions and the necessity of applying the "same transaction" test in order to protect against double jeopardy violations. In short, the Government's memorandum does not respond to the constitutional claims raised by the appellant.

Secondly, the contention of the Government that BOTERO does not assert Government knowledge that his 1974 trial was for acts in furtherance of the conspiracy is an error.

Third, the Government waiver argument is lacking in legal foundation. The Federal Rules of Criminal Procedure

12(b) (2) does not require that motions to dismiss an indictment on double jeopardy grounds be raised prior to trial to prevent waiver. U.S. v. Anderson, 514 F.2d 583 (7th Cir., 1975); U.S. v. Young, 503 F.2d 1072 (3rd Cir., 1974); U.S. v. Scott, 464 F.2d 832 (D.C. Cir., 1972).

Appellant BOTERO raised the double jeopardy issue at trial several times. Moreover, the Circuit Courts are reluctant to find waiver of the substantial right of double jeopardy:

"We should particularly scrutinize a claim of waiver when it relates to a right as fundamental as that embodied in the constitutional protection against double jeopardy. See Kepner v. U.S., 195 U.S. 100, 135 (1904) (dissenting opinion of Mr. Justice Holmes)."

U.S. v. Anderson, supra, 514 F.2d at 586.

Moreover, at the time appellant raised the double jeopardy issue during the course of the trial, it was determined by the District Court on its merits and without objection from the Government on the grounds that the issue had been waived. Thus, the Government cannot now assert that the double jeopardy argument has been waived. U.S. v. Young, supra, 503 F.2d at 1074-75.

Conclusion

WHEREFORE, the appellant Edgar RESTREPO-BOTERO requests that the indictment be dismissed on the grounds that his double jeopardy protection was violated by piecemeal prosecutions.

Respectfully submitted,

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RACHEL H. WOLKENSTEIN
On the Brief

United States Court of Appeals
for the Second Circuit

United States of America,

Plaintiff- Appellee,

against

Franciso Adriano Armedo-Sarmiento, et anos.,

Defendants-Appellants.

**AFFIDAVIT
OF SERVICE**

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

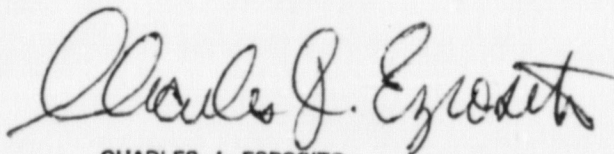
Charles Tynen, being duly sworn, deposes and says that he is over the age of 18 years, is not a party to the action, and resides at 2189 Pitkin Avenue, Brooklyn, New York
That on August 24, 1976, he served 2 copies of
Reply Brief
on

Robert B. Fiske, Jr.,
1 St Andrews plaza,
New York, New York, 10007

by delivering to and leaving same with a proper person or persons in charge of the office or offices at the above address or addresses during the usual business hours of said day.

... Charles Tynen ...

Sworn to before me this
24th day of August, 1976



CHARLES J. ESPOSITO
Notary Public, State of New York
No. 30-1132025
Qualified in Nassau County
Commission Expires March 30, 1977